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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 863

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent,

VS.

ALBERT A. RABY,

Petitioner.

Petition For Writ Of Certiorari
To The
Supreme Court Of Illinois

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THE PEOPLE OF THE STATE OF ILLINOIS,

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vs.

ALBERT A. RABY,

Petitioner.

Petition For Writ Of Certiorari To The Supreme Court Of Illinois

Petitioner prays that a writ of certiorari issue to review the judgment of the Illinois Supreme Court entered in the above case on September 24, 1968. No petition for rehearing was filed.

OPINION BELOW.

The opinion of the Illinois Supreme Court is reported at 40 Ill. 2d 392 and is set out in full as an appendix to this petition.

THE RECORD.

A certified copy of the record below has been filed in this Court.

JURISDICTION.

The judgment of the Illinois Supreme Court was entered on September 24, 1968 (R. 18).

Jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1257.

QUESTIONS PRESENTED.

Whether the proscription of sections 26-1(a) and 31-1 of Chapter 38, Illinois Revised Statutes violates the First and Fourteenth Amendments by reason of vagueness and overbreadth?

Whether the failure to strike the complaints herein violated petitioner's Sixth and Fourteenth Amendment rights?

Whether the amendment of the resisting or obstructing arrest complaint after the commencement of trial violated petitioner's Sixth and Fourteenth Amendment rights?

Whether the amendment of the List of Witnesses after the commencement of the trial violated the petitioner's Sixth and Fourteenth Amendment rights?

Whether the failure to instruct the jury on the essential elements of the offenses violated the petitioner's Fourteenth Amendment rights?

STATEMENT.

On June 28, 1965, the petitioner in the company of several other persons went to the office of the Mayor of the City of Chicago to discuss the problem of racial segregation in the Chicago Public Schools. While the petitioner and his group were with the Mayor a number of peaceful demonstrators walked around the City Hall building carrying signs and placards protesting racial segregation in the schools.

A large number of police officers were dispatched to the scene and together with members of the press and other news media and persons who stopped to observe the scene the crowd grew to approximately fifteen hundred people.

The petitioner left the City Hall by way of the La Salle Street entrance and made a speech to the people present. This speech lasted for two to ten minutes according to the testimony of various witnesses.

After completion of the speech the demonstrators broke up into two groups. Petitioner and approximately sixty-five others went to the intersection of Randolph and La Salle Streets. Thereupon the petitioner went into the intersection of Randolph and La Salle Streets and assumed a sitting or prone position (R. 835). He remained in the intersection for approximately twenty minutes until Officer Richard Becker and other police officers carried the petitioner to a police van scraping him across the ground in the process.

The petitioner was subsequently charged with seven separate violations of the Municipal Code of Chicago

and the State Statutes (R. 80). Thereafter on January 31, 1966, the petitioner filed a motion to strike the complaints on the ground that the complaints failed to state a cause of action with sufficient clarity to allow the petitioner to know the nature of the charge (R. 65). That motion was denied. On September 12, 1966, the petitioner again presented a Petition for Discharge wherein he alleged that the statutes were unconstitutionally void for reasons of vagueness and overbreadth and violative of the Fourteenth Amendment (R. 80, 81, 161, 162). This motion was denied (R. 248). After his conviction the petitioner moved the court for a new trial wherein he alleged the constitutional invalidity of the statutes and other procedural defects (R. 115-120, 198-203). This motion was denied (R. 126).

Subsequent to the commencement of the trial, and after the denial of the petitioner's motion to strike the complaints, the court granted the State leave to amend the resisting or obstructing arrest complaint over the objection of the petitioner (R. 244, 248).

Prior to the commencement of the trial the petitioner moved for and received a List of Witnesses from the State wherein the State set forth the names of the persons who would be called upon to testify on behalf of the State (R. 28, 57). After the commencement of the trial, and immediately prior to introduction of evidence the State sought leave to file an Amended List of Witnesses. Over the objection of the petitioner leave was granted (R. 249) and the Amended List of Witnesses was filed (R. 90, 171).

The Court's instruction to the jury regarding the nature and elements of the offenses is contained in five

instructions (S.R. 16, 17, 18, 19, 20), all of which were given over the objection of the petitioner (R. 505, 506, 507, 508, 509).

On review, the Illinois Supreme Court held that sections 26-1(a) and 31-1's proscriptions are not vague and overbroad (Appendix, pp. 6a, 7a). The Court held (Appendix, pp. 2a, 3a) that the words "knowingly" and "unreasonable" save the disorderly conduct statute from unconstitutionality. Similarly the Court held (Appendix, p. 6a) "knowing resistance" saved the resisting or obstructing arrest statute from unconstitutionality.

The Illinois Supreme Court held (Appendix, pp. 7a, 8a) that the complaints, while not "grammatical elegance," did inform the defendant of the date and place of the occurrence. The Court held that the failure of the State to provide petitioner with a complete list of its witnesses prior to trial did not abridge the petitioner's Sixth Amendment rights. Finally, the Court rejected petitioner's contention that the court failed to instruct the jury on the essential elements of the offenses holding (Appendix, p. 11a) that the objections "do not merit discussion," except the State's Instruction which defined the resisting or obstructing arrest statute as embracing "passive" and "active" conduct, and as to that instruction the Court held it to be correct in view of the record (Appendix, p. 11a). Petitioner seeks review of this decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a Redress of grievances.

United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Fourteenth Amendment, Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Illinois Revised Statutes, Chapter 38, Section 26-1(a)(1)

A person commits disorderly conduct when he knowingly:

(1) Does any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace; or . . .

Illinois Revised Statutes, Chapter 38, Section 31-1

A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer of any authorized act within his official capacity shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both.

REASONS FOR GRANTING THE WRIT.

CERTIORARI SHOULD BE GRANTED TO REVIEW THE ILLINOIS SUPREME COURT'S HOLDING THAT THE ILLINOIS DISORDERLY CONDUCT AND RESISTING OR OBSTRUCTING A PEACE OFFICER STATUTES ARE COMPATIBLE WITH THE FIRST AND FOURTEENTH AMENDMENTS.

The petitioner was convicted on general verdicts of the charges of disorderly conduct and resisting or obstructing a peace officer (R. 100, 181). Illinois Revised Statutes, Chapter 38, Section 26-1(a) and Illinois Revised Statutes, Chapter 38, Section 31-1. The charges and verdicts squarely present the problems of vagueness and overbreadth, whose constitutionality under the First and Fourteenth Amendments petitioner challenged below and challenges here.

Petitioner submits that neither the disorderly conduct nor the resisting or obstructing a peace officer statutes is drawn with the narrow specificity required to inform men of common intelligence what is sought to be prohibited by the statutes. *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). Here, as in *Connally* v. *General Construction Co.*, 269 U.S. 385, 391, and *United States* v. *Capital Traction Co.* 34 App. D.C. 592, 19 Ann. Cas. 68 we have a conviction under statutes where there is a total absence of any definition of what shall constitute the crimes.

The Illinois Supreme Court rejected petitioner's vagueness challenge to the disorderly conduct statute, saying:

> The legislature deliberately chose to frame the provision in general terms, prompted by the futility of

> an effort to anticipate and enumerate all of the methods of disrupting public order that fertile minds might devise. "Section 26-1(a) is a general provision intended to encompass all the usual types of 'disorderly conduct' and 'disturbing the peace.' Activity of this sort is so varied and contingent upon surrounding circumstances as to almost defy definition * * * In addition, the task of defining disorderly conduct is further complicated by the fact that the type of conduct alone is not determinative but rather culpability is equally dependent upon the surrounding circumstances * * * These considerations have led the Committee to abandon any attempt to enumerate 'types' of disorderly conduct. Instead, another approach has been taken. As defined by the Code, the gist of the offense is not so much that a certain type of behavior was accomplished, as it is that the offender knowingly engaged in some activity in an unreasonable manner which he knew or should have known would tend to disturb, alarm or provoke others. The emphasis is on the unreasonableness of his conduct and its tendency to disturb." 40 Ill. 2d 392.

The court holds that the words "knowingly" and "unreasonable" saved the provision from unconstitutionality, apparently on the theory that the petitioner is not in a position to complain about lack of fair notice, since he knows better than anyone exactly what he did wrong.

Given this construction, the decision of the Illinois Supreme Court flies in the face of this Court's decision in *Connally* v. *General Construction Co.*, 269 U.S. 385, 393, where this Court quoted with approval from *United States* v. *Capital Traction Co.*, saying:

> ". . . The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they

> will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, *in advance,* what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon one conception of its requirements and the courts upon another." (Emphasis supplied.)

One reason for the requirement of specificity as a part of the due process clause is that overly vague statutes allow courts to reach arbitrary, ad hominem, or ad hoc results. Although the void-for-vagueness doctrine has traditionally been viewed as concerned principally with the problem of fair notice to the potential criminal actor, a somewhat more subtle consideration has long been evident in the opinions of this Court's vagueness decisions. This is the concept that a vague statute fundamentally affronts the rule of law embodied in the Due Process clause by permitting and encouraging more or less arbitrary and erratic arrests and convictions. An over-vague criminal law, this Court has recognized, "licenses the jury to create its own standard in each case." *Herndon* v. *Lowry,* 301 U.S. 242, 263 (1937). It is "susceptible of sweeping and improper application," *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 432, 433 (1963), furnishing a convenient tool for "harsh and discriminatory enforcement by prosecuting officials, against particular groups deemed to merit their displeasure." *Thornhill* v. *Alabama,* 310 U.S. 88, 97-98 (1940). It "lends itself to selective enforcement against unpopular causes." *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 432, 433.

This potential for impermissible and abusive administration may helpfully be conceived in two intimately related but distinguishable aspects. First, there is the authority which vague laws confer upon the police for arbitrary street enforcement, arbitrary arrest, and similar harassments. Second, there is the propensity of vague laws to enable arbitrary court enforcement, arbitrary conviction. The first aspect was initially recognized by this Court in cases like *Herndon* and *Button,* in which the challenged legislation lent itself to use, and actually appeared to have been used, for the suppression of unpopular political expression, and was voided under the particularly stringent standards of statutory specificity evolved by this Court for First Amendment cases. Because of its origin in these cases, and because in each case the same statutory obscurity which licenses "the jury to create its own standards" also confronted the citizen with an unfairly and repressively vague line of prohibition, the concern for lawless or arbitrary court enforcement failed for a time to emerge from a complex of other concerns, including traditional fair-notice concerns and free-speech concerns. But in *Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966), constitutional invalidation of laws authorizing arbitrary court enforcement came into its own. No question of protecting freedom of expression was involved; and since an issue of judicial standards for sanctions, rather than of standards for conduct demanded of the defendant was presented, no problem of fair notice could be made out. This Court held the statute unconstitutional simply because it "contains no standards at all, nor does it place any conditions of any kind upon the jury's power to impose costs . . . Certainly one of the basic purposes of the Due Process

Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land."

The Illinois Supreme Court also rejected the overbreadth challenge to Section 26-1(a), on the ground that petitioner's conduct was not constitutionally protected. The Court cited *Cox* v. *Louisiana,* 379 U.S. 536, 554 (1965) for the proposition that petitioner's conduct fell within the ambit of the *Cox* dictum that no one could "contrary to traffic regulation insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly."

The trouble is that petitioner was not convicted for violation of a traffic regulation. Petitioner's conduct if criminal in any respect violated the provisions of the Obstructing Person In Highway Statute, Chapter 95½, Section 197 of Illinois Revised Statutes, and not 26-1(a). The holding that petitioner's conduct violated Section 26-1(a) sweeps unnecessarily broadly, and thereby may invade the area of protected freedoms. Cf. *Zwicker* v. *Koota,* 389 U.S. 241, 249-250 (1967). It is no answer that the statute might be narrowly construed in a given situation, the statute as it presently stands, has a chilling effect on free speech conduct. See *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965). Nor is it relevant that the acts of the petitioner are not constitutionally protected. It is the vice of the statutes rather than the virtue of the petitioner that becomes the *ratio decedendi.*

DENIAL OF A FAIR TRIAL.

Alternatively, petitioner was denied a fair trial because (1) the trial court refused to strike the complaints herein; (2) the trial court allowed the State to amend

the Resisting Or Obstructing A Peace Officer complaint over the objection of the petitioner, after the denial to strike; (3) the trial court allowed the State to amend the List of Witnesses which had previously been filed after the commencement of the trial; (4) and the trial court failed to instruct the jury on the essential elements of the crimes sought to be charged.

The complaint which sought to charge the petitioner with disorderly conduct was laid in the language of the Chicago Disorderly Conduct Ordinance as well as the Illinois Disorderly Conduct Statute.* There was no further specification of the nature of the elements of the offense. The activity that allegedly breached the peace was not specified. The petitioner's alleged unlawful purpose was not named. The annoyance or disturbance was not particularized but rather was left in the form of a legal conclusion. No ultimate fact about the petitioner's conduct was specified other than the fact that whatever he did was done in a crowd or a body.

The complaint which sought to charge petitioner with Resisting or Obstructing a Peace Officer charged the petitioner with both violent and non-violent acts in the same count.

The petitioner moved to strike the complaints on the ground that they failed to inform him of the nature of

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* Chapter 193, Section 1, Municipal Code of Chicago. "All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the City; *all persons who shall collect in bodies or crowds for unlawful purposes, or for any purpose, to the annoyance or disturbances of other persons* . . . shall be deemed guilty of disorderly conduct . . ." (Emphasis supplied)

the charges against him as required by the Sixth Amendment. This motion was denied.

A disorderly conduct and resisting or obstructing a peace officer statute are probably the best examples of statutes that do not specify the particular acts that constitute the offense. Obviously, the general language of two disorderly conduct provisions is little better than the general language of one. Hence, the recital of the Chicago Disorderly Conduct Ordinance told the petitioner no more about what activities of his the State deemed criminal than the recital of the State statute itself.

The amendment to the Resisting or Obstructing a Peace Officer complaint, after the denial of petitioner's motion to strike it clearly violated the petitioner's Sixth Amendment right to know the nature of the charges against him prior to trial.

The trial court allowed the State to file an Amended List of Witnesses after the commencement of the trial. Pursuant to State Statute the petitioner had previously moved for and received a List of Witnesses from the State. The petitioner prepared for his trial on the basis of the information furnished by the State pursuant to its statutory duty.

Petitioner submits when (1) he is told by the state pursuant to state statute, Ill. Rev. Stat., Chapter 38, Sec. 114-9, that the witnesses against him will be chosen from designated names; (2) most of the witnesses who in fact testify against him are not on the list; (3) he does not learn the names of such witnesses until after the trial has commenced; (4) it appears on the face of the record that the prosecutor could easily have learned of the existence of such witnesses in time to

afford the defendant a fair chance to meet their testimony; and (5) the prosecutor immediately calls those witnesses without even a day's delay the petitioner is denied his right to confront witnesses against him in violation of the Sixth and Fourteenth Amendments.

If petitioner's right to confront the witnesses against him includes the right to counsel for cross examination of his accusers, as this Court held in *Pointer* v. *Texas,* 380 U.S. 400, 401, 408-414, as a corollary it includes the right that counsel not be prevented from making meaningful preparation for cross examination. When the prosecutor in effect tells the defense counsel he need not prepare to face certain witnesses, need not investigate their reputation for veracity nor their personal knowledge of the alleged offense, and then calls those witnesses before defense counsel can recover from the misconceptions induced by the state, the petitioner has been denied the opportunity for the full and adequate cross examination secured by the Sixth and Fourteenth Amendments. *Pointer* v. *Texas,* 380 U.S. 400, 401, 408-414; *Douglas* v. *Alabama,* 380 U.S. 415, 418.

The trial court failed to instruct the jury on the essential elements of the offenses charged. The court instructed the jury on the essential elements of the offenses in the language of the statutes. In addition the court instructed the jury, regarding the charge of resisting or obstructing arrest, as follows: "The court structs the jury, as a matter of law, that resisting a peace officer in the performance of his duty may be passive as well as active. To interfere and obstruct does not require active resistance and force."

Just as the statute cannot constitutionally constitute the police as censors of conduct as yet undefined and

authorize criminal convictions for conduct deemed reprehensible, neither can the jury be vested with such unfettered discretion. The failure of the trial court to accurately and adequately instruct the jury on the essential elements of the offenses "licenses the jury to create its own standard." *Screws* v. *United States,* 325 U.S. 91, 106.

CONCLUSION.

For the reasons set out above, petitioner asks this Court to grant review, and to reverse the Court below.

Respectfully submitted,

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APPENDIX

MR. JUSTICE SCHAEFER DELIVERED THE OPINION OF THE COURT:

A jury in the circuit court of Cook County found the defendant, Albert A. Raby, guilty of disorderly conduct and resisting arrest. He was fined $500 on the disorderly conduct charge, and was sentenced to three months in the county jail for resisting arrest. On this direct appeal, he contends that his constitutional rights were violated in several respects.

The facts are undisputed. On June 28, 1965, the defendant and several other persons conferred with the mayor of the city of Chicago about problems of racial segregation in the Chicago public schools. During the conference a number of persons marched around the City Hall block, carrying banners and signs protesting racial segregation in the schools. At the conclusion of the conference, the defendant made a brief speech at the LaSalle Street entrance to the City Hall. After the speech, about 5:00 P.M., at the peak of the evening rush hour, the defendant and about 65 others went to the intersection of Randolph and LaSalle Streets where they either sat down or lay down, completely blocking traffic through the intersection. Police officers asked that they leave the intersection. They refused, and approximately twenty minutes later the officers began placing them under arrest. To arrest the defendant, the officers had to untangle him from others with whom he had intertwined his arms and legs. He then "went limp" and had to be carried to a police van.

(Appendix)

The sections of the Criminal Code under which the defendant was convicted are:

> Section 26-1(a). "A person commits disorderly conduct when he knowingly: (1) Does any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace * * *." (Section 26-1(b) provides that "a person convicted of a violation * * * shall be fined not to exceed $500.") Ill. Rev. Stat. 1967, chap. 38, par. 26-1.
>
> Section 31-1. "A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer of any authorized act within his official capacity shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both." Ill. Rev. Stat. 1967, chap. 38, par. 31-1.

The defendant's first contention is that "on their face, and as applied to defendant's conduct sections 26-1(a) and 31-1's proscriptions are vague and overbroad in violation of the first and fourteenth amendments of the United States Constitution and Article II, sections 2 and 4 of the Illinois Constitution."

As to the validity of section 26-1(a), it is said that to be guilty of an offense "a defendant need only commit an act which subjectively alarms or disturbs another and thereby provokes a breach of the peace," and that the statute "subjects citizens' right to engage in certain undefined conduct to the unfettered discretion of the police." But these arguments overlook the words of the statute which qualify the frame of mind of both the actor and of those affected by the actor's conduct. That conduct must be engaged in "knowingly" and "in such unreasonable manner" as to provoke a breach of the

peace. The word "knowingly" describes a conscious and deliberate quality which negatives accident or mistake. "Unreasonable" is not a term that is impermissibly vague. As used in the fourth amendment it furnishes the governing standard by which the legality of police intrusions upon privacy are measured. (*Terry* v. *Ohio,* 392 U.S. 1; 20 L. Ed. 2d 889.) As used in this statute it removes the possibility that a defendant's conduct may be measured by its effect upon those who are inordinately timorous or belligerent. The well recognized common-law term "breach of the peace" appears in section 6 of article I of the constitution of the United States.

By a process of selection from among various dictionary definitions of the words used in the pertinent portion of section 26-1(a), the defendant concludes that if those words are read literally, "a person is guilty of disorderly conduct when he engages in 'conduct which constitutes a breach of the public peace or violates the standards of public morality when he does any act in an irrational, foolish, unwise, absurd, silly, preposterous, senseless, stupid manner so as to frighten, terrorize, apprehend or throw into disorder another and to provoke a violation of public order'." Such a method of interpretation could, of course, be applied to drain the sense and meaning out of any constitutional or statutory provision, for there are few words that have a constant meaning regardless of their context. In no case has the statute been applied or construed in the irrational manner the defendant suggests and we foresee no possibility that any court would so construe it.

It is true that section 26-1(a) does not attempt to particularize all of the myriad kinds of conduct that may

fall within the statute. The legislature deliberately chose to frame the provision in general terms, prompted by the futility of an effort to anticipate and enumerate all of the methods of disrupting public order that fertile minds might devise. "Section 26-1(a) is a general provision intended to encompass all of the usual types of 'disorderly conduct' and 'disturbing the peace'. Activity of this sort is so varied and contingent upon surrounding circumstances as to almost defy definition. * * * In addition, the task of defining disorderly conduct is further complicated by the fact that the type of conduct alone is not determinative, but rather culpability is equally dependent upon the surrounding circumstances. * * * These considerations have led the Committee to abandon any attempt to enumerate 'types' of disorderly conduct. Instead, another approach has been taken. As defined by the Code, the gist of the offense is not so much that a certain overt type of behavior was accomplished, as it is that the offender knowingly engaged in some activity in an unreasonable manner which he knew or should have known would tend to disturb, alarm or provoke others. The emphasis is on the unreasonableness of his conduct and its tendency to disturb. * * *" S.H.A., chap. 38, par. 26-1. Drafting Committee Comments.

The defendant also argues that section 26-1(a) is overbroad because it may be applied to "persons exercising their First and Fourteenth Amendment freedoms of expression." This argument is untenable because it attributes to the statute an unreasonably broad construction that no court would sanction, and the "constitutionality of a statute * * * is not dependent on its susceptibility of misapplication." (*Landry* v. *Daley* (N.D. Ill.

1968), 280 F. Supp. 938, 960.) Moreover, the contention adopts a view already rejected by the United States Supreme Court that "an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States* v. *O'Brien* (1968), 391 U.S. 367, 20 L. Ed. 672, 679.

Under no circumstances would the statute "allow persons to be punished merely for peacefully expressing unpopular views". A construction by the Louisiana Supreme Court which permitted such a result caused the invalidation of Louisiana's "disturbing the peace" statute. (*Cox* v. *Louisiana,* 379 U.S. 536, 544, 13 L. Ed. 2d 471, 484.) But in that same case, upon which defendant heavily relies, the Supreme Court upheld the constitutionality of proscribing the precise conduct engaged in by the defendant—conduct clearly within the language of the present statute. "The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of government responsibility to insure this necessary order. * * * One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly." (379 U.S. at 554, 13 L. Ed. at 484.) We cannot accept defendant's contention that section 26-1(a) was unconstitutionally applied.

(Appendix)

The validity of section 26-1(a) was recently sustained by a three-judge Federal district court against an attack like that mounted by the defendant in this case. (*Landry* v. *Daley* (N.D. Ill., 1968), 280 F. Supp. 938.) And a similar attack was rejected in *United States* v. *Woodard,* (7th cir.), 376 F. 2d 136, a case that arose under the Federal Assimilative Crimes Act. (18 U.S.C. 7, 13.) A similar New York disorderly conduct statute was sustained in *United States* v. *Jones* (2d cir.), 365 F. 2d 675, and a New Jersey disorderly conduct statute, couched in terms at least as broad as section 26-1(a), was sustained in *New Jersey* v. *Smith* (1966), 46 N.J. 510, 218 A. 2d 147, 151, *cert.* denied, 385 U.S. 838, 17 L. Ed. 2d 71.

We agree with the conclusions that have been reached in these decisions, and we hold that section 26-1(a) is not vulnerable to the constitutional attack advanced by the defendant.

The defendant attacks the resisting-arrest provision (Ill. Rev. Stat. 1967, chap. 38, par. 31-1) upon the ground that it fixes no standards for the ascertainment of guilt. This attack was recently rejected in *Landry* v. *Daley* (N.D. Ill. 1968), 280 F. Supp. 938, 959. In that case the court emphasized that the statute requires knowing resistance or obstruction, "which considerably narrows the scope of the enactment by exempting innocent or inadvertent conduct from its proscription". (280 F. Supp. at 959.) The court further noted that the statutory terms convey commonly recognized meanings. 'Resisting' or 'resistance' means 'withstanding the force or effect of' or the 'exertion of oneself to counteract or defeat'. 'Obstruct' means 'to be or come in the way of'. These terms

are alike in that they imply some physical act or exertion. Given a reasonable and natural construction, these terms do not proscribe mere argument with a policeman about the validity of an arrest or other police action, but proscribe only some physical act which imposes an obstacle which may impede, hinder, interrupt, prevent or delay the performance of the officer's duties, such as going limp, forcefully resisting arrest or physically aiding a third party to avoid arrest." (280 F. Supp. at 959.) We agree with these observations, and we hold that section 31-1 is neither vague nor overbroad.

The defendant also argues that the "disorderly conduct complaint and the resisting or obstructing an officer complaint did not charge the offenses with the degree of specificity required by the constitution of the United States, the Illinois Constitution and the Code of Criminal Procedure." The disorderly conduct charge alleged that the defendant "on or about 28 June 1965 at Randolph and LaSalle committed the offense of disorderly conduct in that he knowingly did collect in a crowd or body for unlawful purposes or for purposes to the annoyance or disturbance of other persons, in such unreasonable manner as to alarm and to disturb another and to provoke a breach of the peace." With the exception of the allegation of time and place, and the specification that the defendant "did collect in a crowd or body for unlawful purposes or for purposes to the annoyance or disturbance of other persons," the charge is in the language of the statute.

The complaint is not a model of grammatical elegance. but it does inform the defendant of the date and place of

the occurrence, and it specifies the conduct involved—collecting in a crowd to annoy and disturb other persons. The fact that this portion of the complaint uses language that is used also in an ordinance of the city of Chicago is of no significance. That language was adequate to apprise the defendant of the conduct that constitutes the offense charged against him. If the defendant needed more detailed information to prepare his defense, a motion to that effect should have been made. *City of Chicago* v. *Joyce* (1967), 38 Ill. 2d 368.

Nor can we accept the defendant's contention that the complaint for resisting arrest is similarly defective. After specifying the date and describing the location, that complaint charged that defendant "committed the offense of Resisting or Obstructing a Peace Officer in that he * * * resisted a police officer in the performance of his duty by: When placed under arrest by said officer, refused to voluntarily accompany arresting officer and had to be physically carried away." This complaint adequately apprised the defendant of the particular acts with which he was charged.

The complaint for resisting arrest originally included an additional allegation; that, when placed under arrest, the defendant "refused to voluntarily accompany [the] arresting officer, and had to be physically carried away and while being carried, did kick, squirm, struggle in an effort to escape the custody of said officer." This allegation was stricken after the defendant complained that its inclusion left him in doubt as to whether he was being charged under section 7-7 or section 31-1 of the Criminal Code. The complaint specified only the latter section. Nevertheless, to prevent possible confusion, the State

asked and was granted permission to strike the second allegation. The defendant now argues that it was reversible error to allow this amendment. The argument is without merit. Section 111-5 of the Code of Criminal Procedure provides: "An indictment, information or complaint which charges the commission of an offense * * * may be amended on motion by the State's Attorney or defendant at any time because of formal defects, including: * * * (d) The presence of any unnecessary allegation." Ill. Rev. Stat. 1967, chap. 38, par. 111-5.

The defendant also contends that the "court erred in allowing the state to amend its list of witnesses after the trial had commenced * * *" in violation of section 114-9 of the Code of Criminal Procedure (Ill. Rev. Stat. 1967, chap. 38, par. 114-9) and the sixth amendment to the constitution of the United States. Section 114-9 provides: "(a) On motion of the defendant the court shall order the State to furnish the defense with a list of prosecution witnesses and their last known addresses. (b) The court may permit witnesses not named in an original or amended list to testify when the names of the additional witnesses were not known and could not have been obtained by the exercise of due diligence prior to trial."

The State filed its original list of witnesses on January 20, 1966. It included the names of four members of the Chicago Police Department, only one of whom, Richard Becker, testified at the trial. On September 13, 1966, the day after the jury was impaneled, the State filed an amended list of witnesses, listing Richard Becker and four police officers who had not been on the original list.

The State offered no explanation for its failure to provide the defendant with these names earlier. The defendant's objection was overruled but he did not ask for a continuance.

"The purpose of the requirement that a list of witnesses shall be furnished the defendant is to prevent surprise and afford an opportunity to combat false testimony." (*People* v. *Quevreaux,* 407 Ill. 176, 184; Committee Comments to S.H.A. 1964, chap. 38, sec. 114-9, p. 378.) We have repeatedly held that "allowing unlisted witnesses to testify is within the discretion of the trial court and in the absence of a showing of surprise or prejudice, that discretion will not be reviewed." (*People* v. *Jordan,* 38 Ill. 2d 83, 93; see, *e.g. People* v. *Clay,* 38 Ill. 2d 17; *People* v. *Kenzik,* 22 Ill. 2d 567.) And the "burden of showing surprise or prejudice is on the defendant." *People* v. *Kenzik,* 22 Ill. 2d 567, 571.

In this case the defendant has at no time suggested that if he had been afforded an opportunity to prepare for the testimony of the unlisted witnesses he would have been able to produce rebuttal witnesses or to otherwise impeach the credibility of the unlisted witnesses. (See *People* v. *O'Hara,* 332 Ill. 436, 442, 466.) Moreover, he himself testified to substantially the same facts. He has thus failed to make any showing that it was prejudicial to permit the unlisted witnesses to testify, or that their testimony in any way surprised him. Under these circumstances, we hold that the State's failure to provide defendant with a complete list of its witnesses prior to trial was neither reversible error under section 114-9 of the Code of Criminal Procedure nor an abridgment of

his right to counsel under the sixth amendment to the constitution of the United States.

We have carefully examined the defendant's contentions that reversible error was committed by the trial judge in his rulings upon the instructions. The objections, in our opinion, are not well taken and, with one exception, do not merit discussion. After setting out the statute and the charge with respect to resisting or obstructing arrest, the court gave the following instruction: "The court instructs the jury, as a matter of law, that resisting a peace officer in the performance of his duty may be passive as well as active. To interfere and obstruct does not require active resistance and force." The defendant argues that it was error to give this instruction and to refuse an instruction tendered by the defendant which advised the jury of certain dictionary definitions of the term "resist". The refused instruction emphasized that the term "resist" included the notion of effective opposition: "to oppose actively; to strive, fight, argue or work against; to endeavor to counteract, defeat or frustrate." In this case the police officers described the defendant's conduct as "going limp" so that he had to be carrried to the police van. The defendant testified that he went into the intersection with others in the group, sat down and remained there for twenty minutes until he was removed by police officers. While the defendant testified that he did not know what "going limp" meant, he also testified that he became "relaxed," by which he meant that he was "totally immobile" and in no way resisted or gave any muscular resistance. With the record in this condition, the rulings of the trial court upon these instructions were correct.

(Appendix)

We have carefully examined the defendant's contentions that the trial court erred in refusing to permit a witness called by the defendant to testify. This witness had been present in the courtroom in violation of an order excluding witnesses. To demonstrate error the defendant relies upon numerous decisions that have pointed out that an exclusionary rule must not be administered arbitrarily, but that a sound discretion must be exercised, bearing in mind that a party can not always control the conduct of his witnesses, and that the objective of a trial is to ascertain the truth. The judge's discretion was soundly exercised in this case. The defendant's offer of proof showed that this witness would testify that the defendant had "assumed a prone position in the intersection of Randolph and LaSalle Streets." The offer of proof also embraced testimony as to the defendant's good reputation as a peaceful and law abiding citizen. Numerous other character witnesses testified, and the testimony of this witness would only have been cumulative upon an issue that was not in dispute. The remainder of his testimony would have related to misconduct and brutality of police officers which he said had taken place, after the defendant and others who had been sitting or lying in the intersection had been arrested. This testimony was immaterial.

Finally, the defendant contends that he should not have been sentenced upon both the disorderly conduct charge and the charge of resisting arrest. This contention is based upon section 1-7(m) of the Criminal Code of 1961, which literally authorizes consecutive sentences when "a person shall have been convicted of 2 or more offenses result[ing] from the same conduct", but which

has been construed to prohibit consecutive or concurrent sentences when a person has been convicted of two offenses resulting from the same conduct. (*City of Chicago* v. *Hill,* 40 Ill. 2d ....., ...) The defendant relies upon *People* v. *Ritchie,* 66 Ill. App. 2d 302, in which the appellate court held that the offenses of rape and burglary with intent to commit rape arose out of the same conduct or transaction and that the defendant could therefore not be sentenced for both offenses. The result reached by the appellate court is, however, questionable. (See, *People* v. *Ritchie,* 36 Ill. 2d 392, 397.) Certainly, the offenses in this case are separate and distinct. Unlike *City of Chicago* v. *Hill,* 40 Ill. 2d ....., *People* v. *Golson,* 32 Ill. 2d 398, and *People* v. *Duszkewycz,* 27 Ill. 2d 257, more than a single act is involved in this case. The offense of disorderly conduct was complete before there was any attempt to make an arrest and there was no necessary relationship between the two offenses.

The judgments of the circuit court of Cook County are affirmed.

Judgments Affirmed.

Mr. JUSTICE WARD took no part in the consideration or decision of this case.

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(2) With intent to annoy another, makes a telephone call, whether or not conversation thereby ensues; or

(3) Transmits in any manner to the fire department of any city, town, village or fire protection district a false alarm of fire, knowing at the time of such transmission that there is no reasonable ground for believing that such fire exists; or

(4) Transmits in any manner to another a false alarm to the effect that a bomb or other explosive of any nature is concealed in such place that its explosion would endanger human life, knowing at the time of such transmission that there is no reasonable ground for believing that such bomb or explosive is concealed in such place; or

(5) Transmit in any manner to any peace officer, public officer or public employee a report to the effect that an offense has been committed, knowing at the time of such transmission that there is no reasonable ground for believing that such an offense has been committed; or

(6) Enters upon the property of another and for a lewd or unlawful purpose deliberately looks into a dwelling on the property through any window or other opening in it.

(b) Penalty.

A person convicted of a violation of subsection 26-1(a) (1) or (a) (2) shall be fined not to exceed $500. A person convicted of a violation of subsection 26-1(a) (4), (a) (5) or (a) (6) shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed 6 months, or both. A person convicted of a violation of subsection 26-1(a) (3) shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed 6 months, or both, or shall be imprisoned in the penitentiary not to exceed 18 months. As amended

by act approved June 29, 1967. L.1967, p.——, H. B. No. 633.

Ill. Rev. Stat. Ch. 38, Sec. 31-1

31-1. § 31-1. **Resisting or Obstructing a Peace Officer.]**. A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer of any authorized act within his official capacity shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

I.

THE REQUESTED WRIT OF CERTIORARI SHOULD NOT ISSUE SINCE THE ILLINOIS SUPREME COURT HAS PROPERLY DETERMINED THAT THE ILLINOIS DISORDERLY CONDUCT AND RESISTING A PEACE OFFICE STATUTES ARE CONSTITUTIONALLY APPLICABLE TO THE PETITIONER, AND SINCE THE CONDUCT INDULGED IN BY HIM IS NOT SUCH AS TO COME UNDER THE UMBRELLA OF FIRST AMENDMENT PROTECTION.

The petitioner has requested that this Honorable Court issue a Writ of Certiorari to the Supreme Court of the State of Illinois to review that Court's decision in the case of People of the State of Illinois v. Albert A. Raby, 40 Ill. 2d 392, 240 NE 2d 595 (set forth in the Appendix to the Petition for Certiorari). The only questions raised by the instant petitioner which even seem to be of true constitutional scope are those dealing with the application to him of the Illinois Criminal Code provisions dealing

with Resisting a Peace Officer and Disorderly Conduct. Ill. Rev. Stats., ch. 38 §26-1(a)(1), and Ill. Rev. Stats., ch. 38, §31-1. However, a reading of the well reasoned opinion of Mr. Justice Walter V. Schaefer, of the Illinois Supreme Court shows that that Court properly determined all of the issues presented to it and that there is nothing here which would warrant the issuance of the Writ of Certiorari which the petitioner has requested. United States Supreme Court Rule 19.1 specifically states that the granting of such a writ is not a matter of right but rather an exercise of the soundest judicial discretion. It is readily apparent from an examination of the opinion of the Supreme Court of Illinois that that Court has not decided any issue not many times previously determined by this Honorable Court, and that there is nothing in the opinion which might in any sense be in possible conflict with the past pronouncements of either this Court or of any of the United States District Courts.

Furthermore, it must be noted at the outset that the type of conduct indulged in by the instant petitioner is not such as falls under the umbrella of protection offered by the First and Fourteenth Amendments to the United States Constitution so that all of his claims of constitutional deprivation are completely without foundation.

A.

THE CONDUCT OF THE PETITIONER

The facts in the instant case were not in dispute and showed that on the evening of June 28, 1965, during the height of the "rush hour" traffic situation in the City of Chicago, the petitioner and a number of companions sat or laid down in the downtown intersection of La Salle and Randolph Streets (40 Ill. 2d 392, 394). They com-

pletely blocked the passage of traffic through this intersection and after some 20 minutes the police demanded they get up and be on their way. The petitioner, among others, refused to leave, "went limp", and had to be carried from the intersection by members of the Chicago Police Department (see Appendix to Petition For Certiorari, p.1-a). In its opinion the Illinois Supreme Court specifically found that this conduct was prescribed by the Illinois statutes in question and that it was not conduct protected under the provisions of the First and Fourteenth Amendments (Appendix to Petition for Certiorari, p.5-a) In so holding, Mr. Justice Schaefer cited the opinion of this Honorable Court in Cox v. Louisiana, 379 U.S. 536, 544 (1965). Therein, while the holding of the Louisiana Supreme Court was reversed because the statute there in question was found to be overly broad, this Court also noted that the protection offered by the First Amendment to the United States Constitution did not extend itself to such modes of expression as blocking the passage of traffic along the public streets.

The statement of Mr. Justice Schaefer, speaking for the Court is neither novel nor in any sense conflicting with previous pronouncements of this Honorable Court. Quite the contrary. The First Amendment protections cannot be applied to all modes of expression indiscriminately by the simple process of labeling all of the petitioner's conduct as "free speech" or free expression. United States v. O'Brien, 391 U.S. 367 (1968). As Your Honors pointed out in Poulos v. New Hampshire, 345 U.S. 395, (1953), at p. 405:

> "The principles of the First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any

> public place and at any time a group for discussion or instruction. It is a non sequitur to say that First Amendment rights may not be regulated because they hold a preferred position in the hierarchy of the Constitutional guarantees of the incidents of freedom. This Court has never so held and indeed has indicated the contrary. . ."

And the Court went on to say, at page 408:

> "There is no basis for saying that freedom and order are not compatible. That would be a decision of desperation. Regulation and suppression are not the same, either in purpose or result and courts of justice can tell the difference."

We submit that "telling the difference" is exactly what the Supreme Court of Illinois has done in the instant case. Your Honors have many times held that one of the reasons proper for police intervention in breaking up a group of persons is the clear danger that the result of the group's actions will be the interference with the passage of traffic upon the public thorofares. Feiner v. New York, 340 U.S. 315, 320 (1951); Cantwell v. Connecticut, 310 U.S. 296, 308 (1940). This Court recognizes the strong legitimate interest of the authorities in maintaining order upon the public streets. Kovacs v. Cooper, 336 U.S. 77, 82 (1949); Schneider v. State, 308 U.S. 147, 160 (1939). As one legal writer has put it:

> ". . . The Constitutional status of a grievance does not give First Amendment protection to every form utalizied to air it. Sitting down in Times Square or at the intersection of State and Madison, however lofty the objectives of the demonstrators may be, cannot be supported by Constitutional privilege." (Kamin, Residential Picketing And the First Amendment, 61 N.W. U.L. Rev. 177, 208 (1966)).

Therefore, as was found by Mr. Justice Schaefer, and his collegues, the conduct of the petitioner was not such as to come within the protection of the First Amendment to the United States Constitution. We therefore submit that his claims of Constitutional deprivation are without meaning and that he shows here no reason for the granting of the writ which he requests.

B.

NEITHER ILLINOIS STATUTE IS OVERLY BROAD NOR VAGUE.

There is no validity to the claims of the petitioner that the Illinois Statutory provisions dealing with Disorderly Conduct and Resisting a Peace Officer are overly broad or too vague to inform him in advance of whether or not his contemplated conduct might be prescribed by law. Both contentions were specifically rejected by the Illinois Supreme Court in their opinion.

As to the Disorderly Conduct Provision (Ill. Rev. Stat., ch. 38, §26-1(a)), Mr. Justice Schaefer pointed out that the petitioner's arguments overlook the clear meaning of the words used in the provision. He continued (Petition for Certiorari, pp. 2a-3a, 40 Ill. 2d 392, 395-396):

> ". . . That conduct must be engaged in "knowingly" and in "such unreasonable manner" as to provoke a breach of the peace. The word "knowingly" describes a conscious and deliberate "quality which negatives accident or mistake. "Unreasonable" is not a term which is impermissibly vague. As used in the Fourth Amendment it furnishes the governing standard by which the legality of police instructions upon privacy are measured. (Terry v. Ohio, 392 U.S. 1, 20 L.Ed. 2d 889.) As used in this statute it removes the possibility that a defendant's conduct may be measured

> by the effect upon those who are inordinately timorous or belligerent. The well recognized common-law term "breach of the peace" appears in §6 of Art. I of the Constitution of the United States."

As Justice Schaefer also pointed out, words of the statute must be given their usual and customary meanings and resort to all of the possible dictionary definitions of a term is not proper since by so doing one could render meaningless almost any penal statute. After all, almost all words vary in meaning as does the context in which they are used. Such a holding is also in complete conformity with the past pronouncements of the United States Supreme Court and other Federal Courts of review. The words of a statute are to be given their normal and customary meanings and are not to be viewed by courts of review from the point of grammarians or lexicographers. Beauharnais v. Illinois, 343 U.S. 250 (1952). The sufficiency of the words of a statute to limit its scope and to inform the accused of the conduct prohibited must be determined in view of the interpretation given the statute by the courts of the state in which it is enforced. Winters v. New York, 333 U.S. 507 (1948); United States v. Jones, 365 F. 2d 675 (2d. Cir.-1966).

What has been said above applies with equal force to the other statute here in question, Ill. Rev. Stats., ch. 38, §31-1, dealing with resisting a peace officer. As the opinion of the Illinois Supreme Court points out, this statute specifically provides for some active resistance of a person known to be a peace officer and further requires that that officer must be acting in his official capacity at the time of the resistance (40 Ill. 2d 392, 398-399; Petition for Certiorari, pp. 6a-7a). This certainly is not overly broad and it certainly does inform the potential actor of

what conduct is prohibited by the provision. In fact, the validity of both the Illinois Disturbing the Peace and Resisting a Peace Officer statutes have been upheld in the Federal Courts. United States v. Woodward, 376 F. 2d 136 (7th Cir.-1967); Landry v. Daley, 280 F. Supp. 938 (N.D. Ill. 1968). The statutes here in question were specifically found to be neither too vague nor too broad in scope. In fact, in both of these federal decisions, the conduct which was held to constitute resisting of a peace officer was precisely that of the instant petitioner, "going limp". The act of "going limp" has been held to constitute resisting of a police officer in a number of jurisdictions; Cf. In Re Bacon, 240 Cal. App. 2d 34 (1966); People v. Crayton, 284 N.Y.S. 2d 672 (Supreme Court of New York, 1967). In short, there is simply no doubt that the conduct of the petitioner was properly found to be that covered by the Resisting a Peace Officer statute and that any person would know that such conduct was prohibited. Furthermore, there is no question that the deliberate blocking of a busy intersection during the "rush hour" constituted an act of Disturbing the Peace and that it was not conduct protected by the First Amendment.

Therefore, the People of the State of Illinois submit that no reason has been shown by the petitioner for the granting of the Petition for Certiorari.

II.

THE REMAINING POINTS RAISED BY THE PETITIONER ARE MERELY PROCEDURAL AND IN NO WAY SUPPLY GROUNDS FOR THE ISSUANCE OF THE REQUESTED PETITION.

The remainder of the petition deals with a number of procedural points, none of which provide Your Honors with any reason for the issuance of a Petition for Certiorari to the Illinois Supreme Court.

A.

THE COMPLAINTS RETURNED AGAINST PETITIONER.

The complaints against the petitioner were phrased in the language of the appropriate statutes and informed the accused of the offenses charged and of the conduct for which he was being held responsible. This was sufficient to make both complaints proper. (Petition for Certiorari, pp. 7a-9-a, 40 Ill. 2d 392, 399-401). The test of an indictment is not whether it could have been made more definite and certain but whether it sets forth the elements of the offense, enables the accused to know what he will be required to defend against, and is specific enough to prevent the accused from once again being placed in jeopardy upon the same charges. United States v. Debrow, 346 U.S. 374, 376 (1963); United States v. Kahn, 381 F. 2d 824 (7th Cir.-1967); Cert. Denied 389 U.S. 1015. Indictments are read for their clear meaning and convictions will not be reversed because of minor deficiencies. Smith v. United States, 360 U.S. 1, 9 (1959). A reading of the indictments here in question clearly shows that they were sufficient to properly state the offense charged.

Furthermore, the petitioner is hardly in a position to complain about the amendment of the complaint which charged him with Resisting a Peace Officer (Petition for Certiorari, pp. 13-14). This contention is completely disposed of by the opinion of Mr. Justice Schaefer in the instant case, which shows that the amendment of this complaint was in accordance with the petitioner's own wishes. The Illinois Supreme Court states (Petition for Certiorari, pp. 8a-9a, 40 Ill. 2d 392, 400-401):

> The complaint for resisting arrest originally included an additional allegation: that, when placed under arrest, the defendant "refused to voluntarily accompany [the] arresting officer, and had to be physically carried away and while being carried, did kick, squirm, struggle in an effort to escape the custody of said officer." This allegation was stricken after the defendant complained that its inclusion left him in doubt as to whether he was being charged under section 7—7 or section 31—1 of the Criminal Code. The complaint specified only the latter section. Nevertheless, to prevent possible confusion, the State asked and was granted permission to strike the second allegation. The defendant now argues that it was reversible error to allow this amendment. The argument is without merit. Section III—5 of the Code of Criminal Procedure provides: "An indictment, information or complaint which charges the commission of an offense * * * may be amended on motion by the State's Attorney or defendant at any time because of formal defects, including: * * * (d) The presence of any unnecessary allegation. Ill. Rev. Stat., 1967, ch. 38, §III-5.

It is quite plain that the amendment to the complaint now complained of occurred at the instance of the petitioner himself. It is equally clear that no harm or prejudice could possibly have resulted to him for the action of the trial judge in allowing the amendment, and that the amend-

ment was proper under the provisions of Illinois criminal procedure. We do not believe that more need be said upon this question than was said by Mr. Justice Schaefer in the above quotation.

B.

THE AMENDED LIST OF WITNESSES.

The petitioner also contends that his right to fair trial was abridged by the allowance of the People's request to file an amended list of witnesses at the opening of the trial (Petition for Certiorari, pp. 14-15). When the amended list of witnesses was submitted, the petitioner objected but he did not ask for a continuance when the trial judge accepted the offer of the amended list by the People (Petition for Certiorari, pp. 9a-10-a). Now the petitioner makes a vague assertion that he was somehow prejudiced by the fact that he did not have the names of these witnesses earlier. Yet he has in no way indicated the manner of this prejudice to himself. This fact was noted by Mr. Justice Schaefer in the Illinois Supreme Court's opinion in the instant case There it was noted that the purpose of requiring a list of witnesses is to prevent surprise and to guard against false testimony, and that allowing the amendment of such a list is a matter within the sound discretion of the trial judge (40 Ill. 2d 392, 401-402; Petition for Certiorari, p. 10a). The Court then concluded:

> "In this case the defendant has at no time suggested that if he had been afforded an opportunity to prepare for the testimony of the unlisted witnesses he would have been able to produce rebuttal witnesses or to otherwise impeach the credibility of the unlisted witnesses. (See, People v. O'Hara, 332 Ill. 436, 442, 466.) Moreover, he himself testified to substantially

> the same facts. He has thus failed to make any showing that it was prejudicial to permit the unlisted witnesses to testify, or that their testimony in any way surprised him."

Under these circumstances no reversible error or violation of the constitutional rights of the petitioner could have resulted.

The petitioner attempts to analogize his position concerning the unlisted witnesses to that of the defendant in Pointer v. Texas, 380 U.S. 400 (1965), but the analogy is a false one. In Pointer v. Texas, the defendants were convicted of robbery largely on the basis of testimony elicited from a witness during the course of a preliminary hearing at which the defendants were not represented by counsel. This damaging witness was not available to the prosecution at the time of the trial. His testimony was received by the trial court by way of a transcript of the preliminary hearing, thus completely depriving the defendants of the right to confrontation and cross-examination. This is far different from the instant factual situation, as are the holdings in the other cases cited by the petitioner in his argument concerning the witness list.

Once again, there is nothing to be found here but an allegation that the petitioner was in some way deprived of his constitutional rights and that in some way the decision of the Supreme Court of Illinois is erroneous. But there is no substantiation of any of these allegations and nothing here which would suggest that he is entitled to the issuance of the Writ of Certiorari.

C.

THE INSTRUCTION TO THE JURY.

Finally, the petitioner alleges that the jury was not properly instructed. However, it will be noted that he himself is forced to admit that the jury was given instructions as to both offenses which set out the elements of the crimes in the language of the respective applicable statutes (Petition for Certiorari, pp. 15-16). He seems once again to contend that since the statutes are unconsitutional, these instructions did not properly inform the jury. The propriety of the statutory provisions has already been discussed here at some length. Suffice it to say here that the statutes were proper and that the instructions given in their language informed the jury of the law applicable to the petitioner's conduct.

The petitioner complains of the instruction which told the jury:

> "The court instructs the jury, as a matter of law, that resisting a peace officer in the performance of his duty may be passive as well as active. To interfere and obstruct does not require active resistance and force."

As has been earlier pointed out, passive resistance such as "going limp"—as the petitioner did here—has been held to be resisting a peace officer. See, Landry v. Daley, 280 F. Supp. 938 (N.D. Ill., (1968)). Such an instruction was a perfectly proper statement of the law and as such the jury was entitled to hear it. The giving of this or the other instructions concerning the nature of the two charged offenses was anything but error.

CONCLUSION

For the above and foregoing reasons, the People of the State of Illinois most respectfully submit to this Honorable Court that the request of Albert A. Raby for the issuance of a Writ of Certiorari to the Supreme Court of Illinois in the instant case be denied.

Respectfully submitted,

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